No. 83-1351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANDRES ALONSO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITIONER'S REPLY

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PRELIMINARY STATEMENT

The government's Brief in Opposition never responds to our contention that it was unfair and improper to dismiss this action as a sanction for Petitioner's refusal (1) to tell the government what the government claims it already knows and (2) to yield to the government's efforts to sabotage his relationship with his client. Instead, the government's Brief vilifies Petitioner with speculation and innuendo based on triple hearsay outside the record. Its defense of the illegal search and seizure ignores what really happened in this case. And its lengthy, convoluted discussion of why the law of attorney-client privilege is clear, succeeds only in demonstrating that the law is not clear at all.

We now briefly demonstrate the fatal

flaws in the government's arguments and urge that certiorari be granted to resolve for the benefit of all attorneys and their clients the significant issues presented.

LEGAL DISCUSSION

I

PETITIONER SHOULD NOT BE COMPELLED TO REVEAL THE IDENTITY OF HIS CLIENT, SUBJECT HIS CLIENT TO CRIMINAL PROSECUTION, AND DESTROY THE ATTORNEY-CLIENT RELATIONSHIP.

The law regarding the application of the attorney-client privilege to the identity of the client where disclosure of that identity would implicate the client in a crime is in chaos.

a. In California, whose rules and regulations bind Petitioner, a client's identity is privileged where there is a "strong probability" that disclosure of the identity would implicate the client in the criminal activities for which legal service was sought. (Willis v. Superior

Court, 112 Cal.App.3d 277, 299, 169 Cal. Rptr. 301 (1980).)

b. At the time Petitioner refused to implicate his client in this case, the Ninth Circuit followed the California rule. (Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).) And while that seems to be the rule nominally applied by the Ninth Circuit in this case, another panel of the Ninth Circuit recently limited the privilege to protecting the identity of the client only where disclosure would in substance disclose a confidential communication between the client and the attorney. (In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983).)

c. In other circuits, there are as many rules as there are judges to make them. In the Matter of Walsh, 623 F.2d 489, 494, fn. 6 (7th Cir. 1980), the

Seventh Circuit states that "an exception to the non-privileged status of retainer agreements exists where the payor client is unknown." On the other hand, a different panel of the same court in the Matter of Witnesses Before Sp. March 1980 Gr. Jury, 729 F.2d 489, 492 (7th Cir. 1984) prefers a rule that a client's identity or fee arrangement should be privileged only if disclosure would result in disclosure of confidential communications.

d. For yet another rule, see the related cases pending on petitions for certiorari, Durant v. United States, 723 F.2d 447 (6th Cir. 1983) and Doe v. United States, 722 F.2d 303 (6th Cir. 1983), which state that the identity of the client is privileged where there is a "strong possibility" that disclosure would implicate the client.

Review is clearly needed in this case to bring order out of chaos. This is a matter of urgent and growing concern across the country. As evidenced just by the number of cases which have reached this Court, prosecutors more and more often are pursuing the defense attorney as well as the defendant in ways which disrupt or destroy the attorney-client relationship and undermine the ability of the client to obtain effective legal representation.

If the purpose of the attorney-client privilege is to encourage clients to make full disclosure and to promote the broader public interest in the observance of law and the administration of justice (Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981)), then surely the privilege must apply where, as here, the disclosure of the client's identity or fee arrangement would discourage

or prevent clients from seeking the assistance of counsel at all.

II

IT IS FUNDAMENTALLY UNFAIR AND A DENIAL OF DUE PROCESS OF LAW TO DISMISS PETITIONER'S ACTION AGAINST THE GOVERNMENT FOR HIS FAILURE TO REVEAL INFORMATION WHICH THE GOVERNMENT CLAIMS IT ALREADY KNOWS.

In the related forfeiture action, the government convinced the District Court that Petitioner's $150,000 retainer fee came from a reputed drug leader. In this case, the government obtained dismissal of the action on the ground that Petitioner refuses to reveal where his retainer fee came from.

The government cannot have it both ways. If it already knows where the retainer fee came from, than they are

certainly not entitled to have this case dismissed because Petitioner refuses to tell where the retainer fee came from. The drastic sanction of dismissal would not be rationally related to the needs of this litigation. It would serve merely as punishment for Petitioner for doing what he is compelled to do by law and the ethics of his profession. That is not and cannot be the law, and this Court should so rule.

III

THE SEIZURE OF PETITIONER'S RETAINER FEE OUT OF THE ENVELOPES ADDRESSED TO HIM CLEARLY VIOLATED PETITIONER'S OWN PROPERTY INTERESTS AND CONSTITUTIONAL RIGHTS.

Contrary to the government's arguments, the search and seizure issues are properly

before this Court. Petitioner's motion for return of illegally-seized property, which the District Court denied, was duly appealed by Petitioner and is subject to review. The denial of the motion "without prejudice" did not make it any less prejudicial to Petitioner who continues to be deprived of the possession and use of his retainer fee.

Petitioner was entitled to the return of his retainer fee as a matter of law on the admitted facts, and the government has not shown otherwise. First, it plainly was Petitioner's own property interests and constitutional rights which were invaded. The retainer fee was no less Plaintiff's fee merely because government agents seized it before it physically reached him.

Second, the courier, had no actual or apparent authority to consent to search

the envelopes containing Petitioner's retainer fee. The government agents who accosted him certainly could not have believed he did. The envelopes were addressed to Petitioner. The courier said that he had been paid to deliver the envelopes to Petitioner. He claimed no interest in the envelopes or their contents. The government has not even attempted to refute the numerous authorities cited by Petitioner which hold that a courier has no power to consent to the opening of sealed envelopes which are addressed to the intended recipient.

Third, even if the courier could have given consent to search the envelopes, it is clear that this consent was not freely given. The courier had no real choice. This was nothing like INS v. Delgado, No. 82-1271 (Apr. 17, 1984) where workers were free to leave the work place

during a routine check for aliens. Here, the government agents already had the courier pegged as a drug trafficker (they were wrong) and announced their intent to arrest him if the envelopes contained cocaine. The courier could not possibly, much less reasonably, have believed he could "walk away" from this interrogation without answering the agents' questions and allowing the agents to rifle Petitioner's sealed envelopes.

IV

THIS CASE IS NOT ACADEMIC.

Petitioner's suit is for damages for denial of due process of law and other civil rights in addition to return of his illegally-seized retainer fee. Even if the currency itself were subject to

forfeiture in another proceeding, which it is not, this lawsuit still survives in its other aspects.

Moreover, Petitioner is confident the forfeiture will not stand on appeal because there is not an iota of evidence to support a finding that the currency which constituted Petitioner's retainer fee was in any way related to any crime. The government's "evidence" to justify a forfeiture is based on matters entirely outside the record of this case and is the worst sort of hearsay, self-serving conclusions, unfounded speculation, and innuendo. No rational trier of fact could find probable cause to deprive Petitioner of his retainer fee based on the declaration of a government agent who repeated what he had heard another person say he had heard from some other unnamed person about the seizure of someone else's money

several months before.

CONCLUSION

For each of the reasons stated here and in the Petition for Certiorari, it is respectfully submitted that certiorari should be granted in this case to clarify the applicable rules regarding the attorney-client privilege, discovery sanctions, search and seizure, and to prevent the gross miscarriage of justice which occurred here, and to once and for all, set a standard, for all circuits, to correct the existing conflict that presently exists, even among the same circuits.

Respectfully submitted,

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May 1984